No. 346

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA.

TRANSCRIPT OF RECORD.

In Error to the District Court of the United States, for the District of Alaska.

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The United States,
District of Alaska. } ss.

Pleas and proceedings began and had in the District Court of the United States for the District of Alaska, at the adjourned November term, 1896.

Present: The Honorable ARTHUR K. DELANEY, Judge.

THE UNITED STATES,
Plaintiff,
vs.
ARCHIE SHELP and GEORGE CLEVELAND,
Defendants.
} No. 427.

The United States of America,
District of Alaska. }

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA,

vs.

ARCHIE SHELP and GEORGE CLEVELAND,

23 U. S. Statutes at Large, Chapter 53, Section 14.

Indictment.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand eight hundred and ninety-four, begun and holden at Juneau, in said District.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, accuse Archie Shelp and George Cleveland by this indictment of the crime of unlawfully selling intoxicating liquors within said District, committed as follows: The said Archie Shelp and George Cleveland, at or near Chilcoot, within the said district of Alaska, and within the jurisdiction of this Court, on or about the 18th day of August in the year of our Lord one thousand eight hundred and ninety-four, did un-

lawfully and willfully sell to Alaska Indians, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor called whisky, to-wit, one pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors unknown; without having first complied with the law concerning the sale of intoxicating liquors, in the District of Alaska.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid upon their oaths do say: That Archie Shelp and George Cleveland did then and there unlawfully sell intoxicating liquors to-wit, whisky, in the manner and form aforesaid, to the said Alaska Indians contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

LYTTON TAYLOR,
United States District Attorney.

[Endorsed]: No. 427. United States of America vs. Archie Shelp and George Cleveland. Indictment for violating S. 14, ch. 53, 23 U. S. Stat. at A. A true bill. B. M. Behrends, Foreman of Grand Jury. Witnesses examined before the Grand Jury, Au-ta-iet (Chilkoot)
Eddie "
Dave "

Filed Dec. 6, 1894. Charles D. Rogers, Clerk. Lytton Taylor, U. S. Attorney.

And afterwards, to-wit, on the 2nd day of December, 1895, the following further proceedings were had and appear of record in said cause which are words and figures following, to-wit:

UNITED STATES,

vs.

GEORGE CLEVELAND and ARCHIE SHELP.

No. 427.

Plea.

Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, and the defendant, George Cleveland being personally present and his counsel, John F. Malony, Esq., waives arraignment and further time to plead, and enters a plea of "not guilty" to the indictment.

And afterwards, to-wit, on April 15th, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Trial.

This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally in court, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the venire of the petit jury was called by the clerk, and the jurors sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues: J. C. Hoffman, Ira Lee, H. M. Woodruff, John Calhoun, James Atkinson, Peter Hahn, J. F. Lindsey, J. D. Douglass, Wm. Shuler, O. H. Adsit, Victor Lindquist, John McPherson, and the evidence being heard in part and there not being time to complete the hearing of said cause, the same is continued until 9 o'clock A. M. Thursday, April 16, 1896.

And afterwards, to-wit, on Thursday, April 16, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

The jury in the above-entitled cause having come into court and being called by the clerk, and all answering, the plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, the defendants being present, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the jury rendered the following verdict:

The United States of America, }
District of Alaska. }

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA,

vs.

ARCHIE SHELP and GEORGE CLEVELAND.

Verdict.

Special session commencing March 30, 1896.

We, the jury empaneled and sworn in the above-entitled

cause, find the defendant guilty as charged in the indictment.

J. D. DOUGLAS,
Foreman.

It is therefore ordered by the Court that the jury be discharged from further attendance in this cause and that the defendants be required to furnish recognizance in the sum of five hundred dollars for appearance before this Court for sentence.

And afterwards, to-wit, on April 17, 1896, defendants filed their motion in arrest, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP.
Defendants.

Motion in Arrest of Judgment.

Come now the defendants above named and move the Court to arrest the judgment in the above-entitled cause upon the following ground, to-wit:

First. That the indictment in said cause does not state facts sufficient to constitute a crime against the laws of the United States.

J. F. MALONY,
JNO. TRUMBULL,
Attorneys for Defendants.

[Endorsed]: No. 427. U. S. District Court for the Dist. of Alaska. United States v. George Cleveland and Archie Shelp. Motion in arrest.

Filed April 17, 1896. Charles D. Rogers, Clerk. J. F. Malony and John Trumbull, Attorneys for Defts.

And afterwards, to-wit, on April 17, 1896, defendants filed their motion for a new trial, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP.
Defendants.

Motion for New Trial.

Come now the defendants above named and move the

Court to vacate and set aside the verdict in the above-entitled cause and to grant a new trial upon the following grounds, to-wit:

First. Irregularity in the proceedings of the court and abuse of discretion by the Court, by which the said defendants were prevented from having a fair trial.

Second. Misconduct on the part of the prevailing party, in this, that the United States attorney in his statement of the case to the jury, that as a result of the acts with which the defendants were charged, that a murder had been committed, and in his opening address to the jury after the evidence had been closed, although no evidence had been introduced of a murder, the United States attorney stated to the jury that a murder had been committed, which was the result of the acts charged against the defendants in the indictment, and stated to the jury, that the defendants went to the Indian village at Hoona, and sold whisky to the Indians there, although the defendants were not charged in the said indictment with selling liquor at any place but at Chilchute, and although there was no evidence that the defendants had stopped at Hoona, or had sold liquor there.

Third. Surprise which ordinary prudence could not have guarded against.

Newly discovered evidence. Material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

Fifth. Insufficiency of the evidence to justify the verdict, and that the verdict is against law, in this, to-wit:

That the evidence for the prosecution showed that the persons who sold the liquor to the Indians at Chilkoot were two men whom the Indians had never seen before, whom they describe as the older one having a full beard and the younger one having a mustache and a small growth of beard, while the evidence indisputably shows that at the time the alleged transactions took place the defendant Cleveland had neither a beard or a mustache and the defendant Shelp wore only a mustache. The evidence is further insufficient in this that it appears from the undisputed evidence of Gus Lungren, that the defendants were at Funter Bay, on the 16th and 17th days of August, 1894, about eighty or ninety miles from Chilkoot, and that they left on the morning of the 17th in their sloop; the evidence of William Raymond shows conclusively that the defendants arrived at Bartlett Bay on the morning of the 18th of August; that Bartlett Bay is about forty miles from Funter Bay; that the defendants stayed at Bartlett Bay until the morning of the 19th; and that Bartlett Bay is one hundred and eight miles from Chilkoot, and that the trip from Bartlett Bay to Chilkoot in a sail boat could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot, at any time from the 16th to the 22nd day of August. It further appearing from the evidence of Mr. Ross, the ex-deputy marshal, that the Indians arrived from Chilkoot at Juneau on the 20th of August, and reported the murder which had been committed there and the fact of the sale of whisky to them by two unknown men; that the trip from Chilkoot to Juneau could not be made in less than

two days, so that it manifestly appears that the whisky was sold to them at a time when by the uncontradicted testimony it was a physical impossibility that the defendants could be at Chilkoot.

Sixth. Error in the law occurring at the trial and excepted to by these two defendants, in this, to-wit:

That the Court allowed six Indian witnesses to testify over the objection of the defendants whose names were not indorsed on the indictment upon the direct examination. That no notice was given these defendants that any other witnesses would be called other than those whose names were endorsed upon the indictment. That the Court erred in overruling the defendants' motion for a nonsuit or peremptory instruction to the jury to bring in a verdict for the defendants after the plaintiff had rested its case. The Court erred under the circumstances of this case in instructing the jury that the evidence of an Indian witness was entitled to as much credit as the evidence of a white man, and more especially in this as such instruction was given by the Court with a reference by the Court to the argument of one of the defendants' council, who had stated in his argument to the jury in discussing the weight of evidence "that the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of our religious ideas from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as a witness

whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalty of perjury." The Court erred under the circumstances of this case in instructing the jury that there was no evidence that these defendants had located any mining claims, and in stating to the jury in that connection that it was for them to judge whether the defendants were out prospecting as honest miners or prospecting for the aboriginal native.

Said motion is made upon the records and files of this cause and upon affidavits herewith filed.

J. F. MALONY, and
JNO. TRUMBULL,
Attorneys for Defendants.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, v. George Cleveland and Archie Shelp, Defendants. Motion for a new trial.

Filed April 17, 1896. Charles D. Rogers, Clerk. John F. Malony and John Trumbull, Attorneys for Defts.

And afterwards, to-wit, on April 18, 1896, defendants filed affidavits in support of their motion for a new trial, which are in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHIE SHELP.
Defendants.

Affidavit of W. H. Moran.

District of Alaska. } ss.
United States, }

W. H. Moran, being first duly sworn, deposes and says: My name is W. H. Moran; I am over twenty-one years of age and reside at Treadwell's, on Douglass Island, District of Alaska. On the twenty-second day of August, 1894, I saw George Cleveland and Archy Shelp in Hoona Sound, District of Alaska; that the place at which I saw them in Hoona Sound was at least thirty-five miles out of the direct way if one was going from Bartlett Bay to Chilkoot. That they stayed in and around Hoona Sound for about six days. I was on board their sloop several times while they were there, and saw no indications of them having any liquor on board. They had their miners' tools with them, and to my knowledge were prospecting

at the time in and around Hoona Sound. I have been absent from Alaska between three and four months in the hospital in Seattle, Washington, and arrived in Alaska on the last steamer, "Willapa," about the 9th or 10th of April, 1896; that I did not see either one of the defendants after my arrival until after the jury in this cause had brought in a verdict convicting them of selling whisky at Chilkoot about the 18th day of August, 1894, after which I called upon them, and called their attention to the fact of my seeing them in Hoona Sound at said time.

W. H. MORAN.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.] J. F. MALONY,
Notary Public.

In the United States District Court, in and for the District of Alaska.

Affidavit of George Cleveland.

United States, }
District of Alaska. } ss.

George Cleveland, being duly sworn, deposes and says: I am one of the defendants in the above-entitled action. Subsequent to the trial of said action, to-wit: On the day of the 17th of April, 1896, which will establish the fact of my whereabouts, from the —— day of August, up to the 28th day of August, 1894, that one of said witnesses, W.

H. Moran, will testify that he saw me in company with Archy Shelp in Hoona Sound; that we stayed there for six days prospecting for gold, and not for the aboriginal native; that he was on board our sloop several times; that he saw no liquor on board, and that we had our mining tools and outfit with us; that the reason we did not have the said Moran testify to these facts at our trial was that the last we knew of him he had gone to Seattle, in the State of Washington, and was confined to the hospital at that place. Some three or four months ago when we learned that our trial was coming on I made diligent inquiry for the said Moran, but did not learn of his return to Alaska until the morning of the 17th day of April, 1896, when he came over to see me at Douglas City, and informed me that he had returned on the steamer Willapa about the 10th of this month; that said Moran will further testify that the place at which he saw us in Hoona Sound on the 22nd day of August was at least thirty-five miles out of the direct course to Chilkoot to Bartlett Bay; that I could prove by the evidence of Clarence Stites that he saw myself and Archy Shelp in Hoona Sound, about thirty-five miles from Bartlett Bay, on the 21st day of August, 1894; that he came on board our sloop; that he saw no liquor on board, and that we had our mining tools and outfits with us, and that we were prospecting about the Sound, and that we stayed in that vicinity eight or ten days; that before this trial I made diligent inquiry for the said Clarence Stites, and also before the commencement of this term of court, when I learned there was going to be a term; that from such inquiries I learned that he was at Yakoba Island in the Pacific Ocean, a place which is

almost inaccessible at this season of the year, except for large vessels, and that even if I had had the means to charter such a large vessel there was none to be had in this vicinity: that I did not know of his return until yesterday, April 17th, 1896; that since I have learned of his return I have diligently searched and inquired for him, but so far have been unable to find him; I have been informed that he is out hunting and may not return for several days, and not in time to present his affidavit to this Court, by two o'clock this afternoon as ordered by the Court. Affiant further says that the United States attorney in his opening address to the jury after the evidence had been closed stated as a result of which the defendants were charged, namely: Selling whisky to the Indians at Chilkoot, on or about the 18th day of August, 1894, that a murder had been committed, and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime, although no evidencewhatever had been introduced of any murder having been committed, and stated to the jury that this affiant and co-defendant went to the Indian village at Hoona and sold whisky there, although the defendants were not charged in said indictment with selling liquor at any place except Chilkoot, and although there was no evidence that the defendants had stopped at Hoona or had sold liquor there. Affiant further says that the United States attorney in his said address abused these defendants and attacked their character when they had not put their character in issue and stated to the said jury that if these defendants were the good and innocent men that they tried to make themselves out, why did they

not bring witnesses to testify to their good character. Affiant further says that he believes that these reckless and unwarranted statements made by the United States attorney to the jury influenced the said jury of bringing in a verdict of guilty against this affiant and co-defendant.

GEO. CLEVELAND.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.] J. F. MALONY,
Notary Public.

In the United States District Court, in and for the District of Alaska.

Affidavit of Archie Shelp

United States, }
District of Alaska. } ss.

Archie Shelp being duly sworn, deposes and says: I am one of the defendants in the above-entitled action. Subsequent to the trial of said action, to-wit, on the day of the 17th of April, 1896, which will establish the fact of my whereabouts from the —— day of August, up to the 28th day of August, 1894, that one of said witnesses, W. H. Moran, will testify that he saw me in company with George Cleveland in Hoona Sound; that we stayed there for six

days prospecting for gold, and not for the aboriginal native; that he was on board our sloop several times, that he saw no liquor on board, and that we had our mining tools and outfit with us; that the reason we did not have the said Moran testify to these facts at our trial was that the last we knew of him he had gone to Seattle, in the State of Washington and was confined to the hospital at that place. Some three or four months ago when we learned that our trial was coming on I made diligent inquiry for the said Moran, but did not learn of his return to Alaska until the morning of the 17th day of April, 1896, when he came over to see me at Douglas City, and informed me that he has returned on the steamer Willapa about the 10th of this month; that said Moran will further testify that the place at which he saw us in Hoona Sound on the 22nd day of August was at least thirty-five miles out of the direct course to Chilkoot to Bartlett Bay.

That I could prove by the evidence of Clarence Stites, that he saw myself and George Cleveland in Hoona Sound, about thirty-five miles from Bartlett Bay, on the 21st day of August, 1894, that he came on board our sloop, that he saw no liquor on board, and that we had our mining tools and outfits with us, and that we were prospecting about the Sound, and that we stayed in that vicinity eight or ten days; that before this trial I made diligent inquiry for the said Clarence Stites and also before the commencement of this term of court, when I learned there was going to be a term. That from such inquiries I learned that he was at Yakoba Island in the Pacific Ocean, a place which is almost inaccessible at this season of the year, except for large vessels, and that even if I had had the means to char-

ter such a vessel there was none to be had in this vicinity. That I did not know of his return until yesterday, April 17th, 1896. That since I have learned of his return I have diligently searched and inquired for him, but so far have been unable to find him. I have been informed that he was out hunting and may not return for several days, and not in time to present his affidavit to this Court, by two o'clock this afternoon as ordered by the Court. Affiant further says that the United States Attorney in his opening address to the jury after the evidence had been closed stated as a result of which the defendants were charged, namely: selling whisky to the Indians at Chilkoot, on or about the 18th day of August, 1894, that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime, although no evidence whatever had been introduced of any murder having been committed, and stated to the jury that this affiant and co-defendant went to the Indian village at Hoona and sold whisky there, although the defendants were not charged in said indictment with selling liquor at any place except Chilkoot, and although there was no evidence that the defendants had stopped at Hoona or had sold liquor there.

Affiant further says that the United States Attorney in his said address abused these defendants and attacked their character when they had not put their character in issue, and stated to the said jury that if these defendants were the good and innocent men that they tried to make themselves out, why did they not bring witnesses to testify to their good character.

Affiant further says that he believes that these reckless and unwarraned statements made by the United States Attorney to the jury influenced the said jury of bringing in a verdict of guilty against this affiant and co-defendant.

ARCHIE SHELP.

Subscribed and sworn to before me this 18th day of April, 1896.

[L. S.] J. F. MALONY,
Notary Public.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, vs. Archie Shelp, George Cleveland, Defendants. Affidavits on motion for new trial. Filed Apr. 18, 1896. Charles D. Rogers, Clerk. John F. Malony, John Trumbull, Attorneys for defendants.

And afterwards, to-wit, on Saturday, April 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
vs.
ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Judgment.

Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, as also come the de-

fendants in person, with Messrs. J. F. Malony and John Trumbull, their counsel, and appearing for judgment, and the motion for new trial and the motion for arrest of judgment being denied—

It is ordered, adjudged and decreed that defendants be, and they are hereby, convicted of the crime of unlawfully selling intoxicating liquor in Alaska and sentenced to imprisonment in the U. S. Jail for the District of Alaska for the term of six calendar months.

And afterwards, to-wit, on May 25, 1896, the defendants filed their Bill of Exceptions in said cause, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,

vs.

ARCHIE SHELP and GEORGE CLEVELAND.

Bill of Exceptions.

Be it remembered that afterward, to-wit, on the 16th day of April, in the year of our Lord one thousand eight

hundred and ninety-six, at a special term of said Court, begun and holden in Juneau, in and for the District of Alaska, before his Honor Arthur K. Delaney, the District Judge, the issue joined in the above-stated cause, between the said parties, came on to be tried before the said Judge, and a jury, which was duly empaneled and sworn, to try the issue between the said parties. The plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, and the defendants by John F. Malony, Esq., their attorney, and John Trumbull of counsel. Whereupon the following testimony was offered and introduced on the part of the plaintiff to maintain the issue, and called as a witness Dennis, an Indian, whereupon the defendants objected to the said Dennis being sworn as a witness in the said cause, for the reason that his name was not endorsed upon the indictment, and for the reason that the defendants nor their attorneys had been furnished with a list containing the name of said witness, or in any manner notified that said witness would be called by the plaintiff to testify in said cause, which objections were overruled by the Court, and the witness permitted to be sworn and testify, to which ruling of the Court the defendants then and there excepted, which exceptions were allowed by the Court. Whereupon the said witness was duly sworn, and testified as follows:

My name is DENNIS. I live at Chilkoot. (The District Attorney here pointed out the defendants to the witness and asked the witnes if he knew them.) I know these defendants. I saw them but once, two winters and one summer ago; they were at Chilkoot. Their boat was

anchored off the shore. The younger man (meaning the defendant Cleveland) waved his hat to me, picked up a keg, then drank out of a tin cup. When I came to their boat they gave me whisky to drink, and told me to tell the other people at the village that they had plenty of whisky. I went, and told at the village, and twelve of us came down in a canoe, and got whisky from the white men. I got two bottles, and paid four ($4.00) for it. I never saw the defendants before or since.

Cross-Examination by Mr. Malony.

The defendant Cleveland had a mustache at the time he was at Chilkoot, and small whiskers. The defendant Shelp had whiskers all over his face. I never saw them before or since. The boat was anchored about as far as from here to the sawmill from the land (meaning as far as from Juneau to the mill on Douglas Island). Whereupon the plaintiff called the following witnesses: Goo-Nawk, Dick, Sam-doo, Kassto, Dave, Jim. The defendants objected to the said witnesses being sworn and testifying, with the exception of witness Dave, for the reason that their names were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of the witnesses, or any order of the Court made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment, which objections of the defendants were overruled by the Court, to which ruling of the Court the de-

fendants then and there excepted, which exceptions were allowed by the Court; whereupon all of said witnesses were duly sworn, and testified substantially as the first witness, Dennis, had testified.

Whereupon the plaintiff rested its case, and the defendants moved the Court either for a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground and for the reason that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regard to the sale of intoxicating liquors in Alaska. which motion was overruled and denied by the Court, and to which ruling of the Court the defendants then and there excepted, which exceptions were allowed.

Whereupon the attorneys for the said defendants called as a witness

JOHN C. ROSS, who being duly sworn, testified among other things as follows:

I was Deputy U. S. Marshal, for the District of Alaska, in August, 1894, and resided at Douglas City, near Juneau in said District. I remember the time when the Indians from Chilkoot came to Juneau and made complaint against these defendants for selling whisky to them on the 18th day of August, 1894. The complaint was made on the 20th day of August, 1894, and I started the same afternoon for Chilkoot; the distance from Juneau to Chilkoot is ninety-five miles. The Indians came from Chilkoot to Juneau in canoes. I arrested the defendants on the 3rd day of Sept., 1894. The Indians told me at Chilkoot that the men who sold them liquor wore beards and

mustaches, and that they had never seen them before. (The plaintiff moved that what the Indians told the witness be stricken out, as not the best evidence, which motion was sustained by the Court, and the same ordered stricken, to which ruling of the Court the defendants then and there excepted, which exceptions were allowed.)

Whereupon to maintain the issue on their part the defendant Archy Shelp was called as a witness, who, being duly sworn, testified among other things as follows:

My name is Archy Shelp. I am one of the defendants in this cause. I reside at Douglas, in the District of Alaska. On the 12th day of August, 1894, in company with the defendant George Cleveland, we started from Douglas on a prospecting expedition, in a sloop; we first went to Bear Creek, on Douglas Island, and prospected around there for several days. We left there and arrived at Funter Bay, on Admiralty Island, on the 16th day of August, 1894, and stayed there until the 17th of August. While at Funter Bay, we met one Gus Lungreen, who came aboard our sloop several times. Funter Bay is about ninety miles from Chilkoot; that on the morning of the 17th we left Funter Bay in our sloop and arrived at Bartlett Bay on the morning of the 18th; that Bartlett Bay is about forty miles from Funter Bay; that we stayed at Bartlett Bay until the morning of the 19th of August; while at Bartlett Bay we met one William Raymond, who lives there, and purchased from him some provisions; that Bartlett Bay is about one hundred and eight miles from Chilkoot. On the morning of the 19th of August, 1894, we left Bartlett Bay and went to Hoona Sound, and arrived at Hoona Sound on the morning of the 20th, and

stayed there prospecting around the Sound for eight or ten days; during this time Mr. Cleveland was clean shaven and did not wear either a beard or mustache. I wore only a mustache. I was never at Chilkoot in my life. I never saw, to my knowledge, any of the Indians who testified in this case. When we started out we took our mining tools and outfits with us. We had no whisky on board of our sloop; neither sold or gave away any whisky to Indians.

GEORGE CLEVELAND, being duly sworn on the part of the defendants, testified substantially to the foregoing facts testified to by the defendant Shelp. He further stated as follows:

That it was not true, as stated by the witnesses for the plaintiff, that they did not know him and had never seen him but once. That in 1891 and 1892 he had fished at Chilkoot for the cannery. That he knew said Indians who had testified, and that they knew him. That Hoona Sound was about thirty-five miles out of the direct course from Bartlett Bay from Chilkoot.

Whereupon WILLIAM RAYMOND, being sworn on the part of the defendant, testified as follows:

My name is William Raymond. I live at Bartlett Bay in Alaska, and lived there in August, 1894. I know the defendants. I had never met the defendant Shelp until the 18th of August, 1894, at which time he and George Cleveland came to Bartlett Bay in a sloop. They stopped at Bartlett Bay until the morning of the 19th of August. I was on their sloop several times while they were there.

I saw no indications of them having any liquor on board. I asked them if they had anything to drink; they told me that they had a couple of bottles when they started out but that it was all gone. They had their mining tools and outfit with them, and I understood from them that they were out prospecting. They bought some provisions from me while at Bartlett Bay. They left on the morning of the 19th. The distance from Bartlett Bay to Chilkoot is one hundred and eight miles. The trip could be made from Bartlett Bay to Chilkoot in a boat like the one the defendants had in about three days with average weather.

Cross-Examination by Dist. Attorney.

I remember the date they were at Bartlett Bay from the fact that they bought groceries from me. They offered in payment of the groceries a twenty dollar gold piece. I could not make the change, so I charged the amount of groceries against them in my book, and that is the date of the charge, the 19th day of August, 1894. Mr. Cleveland was clean shaven, wearing neither a beard or a mustache. Mr. Shelp wore a mustache but had no beard. When the defendants left Bartlett Bay on the morning of the 19th they went in the direction of Hoona.

By the Court:

Q. Is there not an Indian village at Bartlett Bay?

A. Yes, sir.

And another at Hoonah?

Yes, sir.

By the Court.—A-h-h! that is all, sir.

Whereupon the defendants to further sustain the issue upon their part called as a witness.

GUS LUNGREN, who being duly sworn, testified among other things as follows:

My name is Gus Lungren. I live at Douglas City in Alaska. On the 16th and 17th days of August, 1894, I was camping at Funter Bay and saw the defendants, Archy Shelp and George Cleveland. They arrived there on the 16th day of August in a sloop, and stayed there until the 17th. I was on board their sloop several times while they were there. I saw no indications of them having liquor on board. They had their mining tools and outfits with them and gave me to understand that they were on a prospecting tour. Funter Bay is about ninety miles from Chilkoot. Mr. Cleveland wore either a beard or a mustache at that time, and had not for some months previous. Mr. Shelp wore a mustache only.

Cross-Examination by Dist. Attorney.

The reason I remember the date was that I left Douglas for Funter Bay on the day that the sawmill burned down at Douglas.

Defendants rest; plaintiff rests.

Whereupon the United States Attorney addressed the jury in behalf of the plaintiff, and among other things stated that the defendants "went to the Indian village at Hoona, and sold whisky there," and also stated to the said jury that "the result of the defendants selling

whisky to the Indians at Chilkoot, on or about the 18th day of Aug., 1894, was that a murder had been committed, and the murderer was now in the penitentiary at San Quentin for that crime," although no evidence was introduced that the defendants sold whisky at Hoona, or that any murder had been committed. The said prosecuting attorney in his said address further stated: "If these defendants were the good and innocent men that they try to make themselves out, why did they not bring witnesses to testify to their good character? " although no evidence had been introduced as to the character of these defendants, and their character was not made an issue by them. Whereupon the counsel for the defendant addressed the jury, and among other things said, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury stated: "That the evidence of ignorant. half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath, as understood by Christian peoples, and who had little or no appreciation of our religious ideas from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury." The argument being closed the Court instructed the jury among other things as follows:

Referring to the remarks of counsel above, the Court instructed the jury as follows:

"It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. In weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities for seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell; and from these things together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies. You have the right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast, going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick, and pan, and shovel, as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native."

To which charge of the Court the defendants then and there excepted on the ground that the same is not the law, is misleading, tending to confuse the jury, and distract their attention from the evidence.

Whereupon the instructions being closed, the jury retired to consider of their verdict, and afterwards, but on the same day, returned into court, and being called answered to their names and say that they had found a verdict, which verdict was "Guilty as charged in the indictment."

Thereupon the defendants by their attorneys gave notice of a motion in arrest of judgment, on the following grounds:

"That the indictment in said cause does not state facts sufficient to constitute a crime against the laws of the United States."

And also filed a motion for a new trial, upon the following grounds:

(Here insert motion for a new trial, and affidavits of Archy Shelp, George Cleveland, and W. H. Moran.) Which motions in arrest of judgment came on for argument and decision on the 20th day of April, 1896, and the argument being closed, the same was submitted to the Court for consideration, and after due deliberation thereon, the Court overrules and denies the said motion, to which ruling and decision of the Court the defendants then and there except.

Whereupon the defendants prayed that this their bill

of exceptions be signed and sealed by the Court, and that same be made a part of the records of this cause, which is accordingly done this 25 day of May, 1896.

ARTHUR K. DELANEY,
Judge.

The foregoing bill of exceptions is correct.

F. D. KELSEY,
Special Assistant U. S. Attorney.
J. F. MALONY and
JNO. TRUMBULL,
Attys. for Defts.

[Endorsed]: No. 427. United States District Court, District of Alaska. United States v. Archy Shelp and George Cleveland. Bill of Exceptions. Original. Filed May 25, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, defendants filed their petition for writ of error, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,

vs.

ARCHY SHELP AND GEORGE CLEVELAND.

Defendants.

Petition for Writ of Error.

Archy Shelp and George Cleveland, the defendants above named, feeling themselves aggrieved by the verdict of the jury, and the judgment entered thereon, on the 20 day of April, 1896, in pursuance of said verdict, whereby it was considered and adjudged that the defendants should be imprisoned in the jail at Sitka, in the Territory of Alaska, for a period of six months.

Come now the said defendants by their attorneys, J. F. Malony and John Trumbull, and petition this Honorable Court for an order allowing them to prosecute the writ of error to the Circuit Court of Appeals of the 9th Circuit, under and according to the laws of the United States in that behalf made and provided, and that all other proceedings in this Court be suspended and stayed until the determination of said writ of error by the said

Circuit Court of Appeals for the 9th Circuit. And your petitioners as in duty bound will ever pray.

J. F. MALONY and
JNO. TRUMBULL,
Attys. for Defendants.

The petition is granted and it is ordered that the writ prayed for issue.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: United States vs. Archie Shelp and George Cleveland. Petition for Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, defendants filed their assignment of errors in said cause, which is in words and figures following, to-wit:

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES,
vs.
ARCHY SHELP and GEORGE CLEVELAND.

Assignment of Errors.

Now come the above named defendants by their attorneys, J. F. Malony and John Trumbull, and say in the

records and proceedings in the above-entitled cause, there is manifest error in this, to-wit:

First: It was error for the Court to overrule the objections of the defendants to the witnesses Dennis, Goonawk, Dick, Samdoo, Casto, and Jim, for the reason that the names of said witnesses were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of said witnesses, and for the further reason that no order of Court was made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment.

Second: It was error for the Court after the plaintiff had rested its case to deny the defendants' motion to a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground that the plaintiff had failed to establish the material allegations of the indictment by evidence, in this, that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regards to the sale of intoxicating liquors in Alaska.

Third: The Court erred in overruling the defendants, motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States.

Fourth: The Court erred in instructing the jury in the manner and under the circumstances as follows, to-wit:

One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses

who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

"That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury, that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury."

After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

"It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all

the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native."

Fifth: The Court erred in denying the defendants' motion to vacate the verdict and to grant a new trial, in this, to-wit:

1. Irregularity in the proceedings and abuse of discretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered yes, sir, whereupon the Court in presence of the jury exclaimed "A-h-h. That is all, sir."

2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: "That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the

murder was in the penitentiary at San Quentin for such crime," although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that "The defendants went to the Indian village at Hoona and sold whisky there," although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there.

3. Surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

5. Insufficiency of the evidence to justify the verdict, in this, to-wit, that it appears from the evidence that the defendants were at Funter Bay on the 16th and 17th days of August, 1894, eighty or ninety miles from Chilkoot; that they left on the 17th on their sloop, and arrived at Bartlett Bay on the morning of the 18th: that Bartlett Bay is about forty miles from Funter Bay; that they stayed at Bartlett Bay until the morning of the 19th; that Bartlett Bay is 108 miles from Chilkoot; that the trip from there to Chilkoot could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot at any time from the 16th to the 22nd of August. It further appearing from the evidence of the ex-Deputy Marshal, who went to Chilkoot two days after the alleged whisky selling took place that

the Indians arrived at Juneau on the 20th day of August, 1894, and made the complaint charging the defendants with selling liquor on the 18th day of August, and that the trip from Chilkoot to Juneau could not be made in less than two days.

6. Error in law occurring at the trial and excepted to by the defendants.

Wherefore the said defendants pray that the judgment of the said United States District Court for the District of Alaska be reversed, and that the said District Court be ordered to enter an order directing the discharge of the said defendants, and sustain the motion in arrest of judgment, or that the order of the said District Court denying the defendants' motion for a new trial be ordered reversed and vacated and the judgment rendered in said cause reversed, and a new trial granted.

J. F. MALONY and
JOHN TRUMBULL,
Attorneys for Defendants.

No. 427. In the U. S. District Court for the District of Alaska. United States vs. Archie Shelp and George Cleveland. Assignment of Errors. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on the 9th day of October, 1896, defendants filed their bond on writ of error, which is in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

THE UNITED STATES, Plff.,

vs.

GEORGE CLEVELAND and ARCHIE SHELP, Defts.

Bond.

A judgment having been given on the 18th day of April, 1896, whereby Archie Shelp and George Cleveland were condemned to imprisonment in the jail at Sitka, Alaska, for the term of six months, and they having appealed from said judgment and been duly admitted to bail in the sum of two thousand dollars—

We, Frank Bach and Charles Morse, of Juneau, Alaska, hereby undertake that the above named George Cleveland and Archie Shelp shall prosecute said appeal with diligence and shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal and render themselves in execution thereof, or if

they fail to do so in any particular, that we will pay to the United States the sum of two thousand dollars.

Dated April 1896.

GEORGE CLEVELAND.
FRANK R. BACH.
CHARLES MORSE.
ARCHIE SHELP.

United States, }
District of Alaska } ss.

Frank Bach and Charles Morse, being duly sworn, says each for himself, that he is a resident and householder of the District of Alaska, and worth the sum of two thousand dollars over his just debts and liabilities and property exempt from execution.

FRANK R. BACH.
CHARLES MORSE.

Subscribed and sworn to before me this 6th day of May, 1896.

[L. S..] J. F. MALONY,
Notary Public.

Approved this 9th day of October, 1896.
ARTHUR K. DELANEY,
U. S. District Judge.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. The United States, Plaintiff, vs. Archie

Shelp and George Cleveland, Defendants. Bond. Filed October 9th, 1896. Charles D. Rogers, Clerk. John F. Malony and John Trumbull, Attorneys for Defendants.

And afterwards, to-wit, on October 9th, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

In the United States District Court, in and for the District of Alaska.

UNITED STATES,
Plaintiff,
vs.
GEORGE CLEVELAND and ARCHY SHELP,
Defendants.

Order Allowing Writ of Error.

The petition of the defendants herein, for an order allowing said defendants to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, coming on regularly to be heard, it is hereby ordered that the said defendants be, and the same is,

hereby allowed to prosecute said writ of error to the said Circuit Court of Appeals for the Ninth District.

Dated Oct. 9, 1896.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. United States, Plaintiff, vs. Archy Shelp and George Cleveland, Defendants. Order allowing Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on October 9th, 1896, a writ of error was issued in said cause, which is in words and figures following, to-wit:

Writ of Error.

United States of America, ss.

The President of the United States of America, to the Hon. Arthur K. Delaney, Judge of the District Court of the United States for the District of Alaska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said District Court before you between the United States, plaintiff, and Archy Shelp and George Cleveland, defendants, a manifest error has happened to the great damage

of the said Archy Shelp and George Cleveland, as is said and appears by the complant, we being willing that suc error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the 9th Circuit, at the Court rooms of said Court, in the City of San Francisco, State of California, together with this writ, so that you have the same at the said place before the Justices aforesaid on the 7 day of November next. That the records and proceedings aforesaid being inspected the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 9 day of October, in the year of our Lord, one thousand eight hundred and ninety-six, and of the independence of the United States the one hundred and twenty-first.

[L. S.] CHARLES D. ROGERS,
Clerk of the Dist. Court for the U. S. of America, for the Dist. of Alaska.

The foregoing writ is hereby allowed.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: No. 427. In the District Court of the United States for the District of Alaska. United States vs. Archie Shelp and George Cleveland. Writ of Error. Filed October 9th, 1896. Charles D. Rogers, Clerk.

And afterwards to-wit, on the 9th day of October, 1896, there was issued out of said District Court of Alaska a citation, which is in words and figures as follows:

Citation.

United States of America, ss.

To the United States and Burton E. Bennett, United States Attorney, District of Alaska—Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the ninth circuit, to be holden in the city of San Francisco, beginning on the first Monday of October, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Disrict Court of the United States for the District of Alaska, wherein Archy Shelp and George Cleveland are plaintiffs in error and the United States are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated October 9, 1896.

ARTHUR K. DELANEY,

Judge of the District Court of the United States of the District of Alaska.

[Endorsed]: No. 427. U. S. District Court for the District of Alaska. The United States, plaintiff, vs. Archie Shelp and George Cleveland, defendants. Citation. Service of the within citation admitted by copy this 9th day of October, 1896. Burton E. Bennett, U. S. Attorney for the District of Alaska, Attorney for plaintiff. Filed October 9th, 1896. Charles D. Rogers, Clerk. J. F. Maloney and John Trumbull, attorneys for defendants.

Clerk's Certificate to Transcript.

United States,
District of Alaska. } ss.

I, Charles D. Rogers, Clerk of the United States District Court, within and for the District of Alaska, do hereby certify that the foregoing pages, numbered from one to 40, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The United States, plaintiff, vs. Archie Shelp and George Cleveland, defendants, as the same remain of record and on file in said office.

In testimony, whereof, I have caused the seal of said Court to be hereunto affixed, at the town of Sitka, in said District, the 9th day of October, A. D. 1896.

[Seal.] CHARLES D. ROGERS,
Clerk.

[Endorsed]: No. 346. United States Circuit Court of Appeals for the Ninth Circuit. Archie Shelp and George Cleveland, Plaintiffs in Error, v. The United States, Defendant in Error. Transcript of Record. In Error to the District Court of the United States for the District of Alaska.

Filed January 2, 1897.

F. D. MONCKTON,
Clerk.